

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

JENNIFER A. OVERBY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

NO. C15-5499-RSM-JPD

REPORT AND  
RECOMMENDATION

Plaintiff Jennifer A. Overby appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) that denied her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further administrative proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 38-year-old woman with a high school diploma. Administrative Record (“AR”) at 228. Her past work experience includes employment as a photographer. AR at 252. Plaintiff was last gainfully employed in 2004. *Id.*

On March 21, 2012, Plaintiff protectively filed a claim for SSI payments, alleging an

1 onset date of June 23, 2006. AR at 213-18, 223. Plaintiff asserts that she is disabled due to  
2 heart problems, thyroid cancer, hormonal imbalances, depression, headaches, back problems,  
3 shortness of breath, and anxiety. AR at 227.

4 The Commissioner denied Plaintiff's claim initially and on reconsideration. AR at 104-  
5 07, 113-18. Plaintiff requested a hearing, which took place on November 7, 2013, in  
6 Columbus, Ohio. AR at 41-76. On December 11, 2013, the ALJ issued a decision finding  
7 Plaintiff not disabled and denied benefits based on his finding that Plaintiff could perform a  
8 specific job existing in significant numbers in the national economy. AR at 10-25. Plaintiff's  
9 administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 1-6,  
10 making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42  
11 U.S.C. § 405(g). On July 20, 2015, Plaintiff timely filed the present action challenging the  
12 Commissioner's decision. Dkt. 1, 3.

## 13 II. JURISDICTION

14 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
15 405(g) and 1383(c)(3).

## 16 III. STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
18 social security benefits when the ALJ's findings are based on legal error or not supported by  
19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
20 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
21 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
22 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
23 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
24 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,

1 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
2 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
3 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
4 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
5 must be upheld. *Id.*

#### 6 IV. EVALUATING DISABILITY

7 As the claimant, Ms. Overby bears the burden of proving that she is disabled within the  
8 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
9 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
10 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
11 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
12 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
13 are of such severity that she is unable to do her previous work, and cannot, considering her age,  
14 education, and work experience, engage in any other substantial gainful activity existing in the  
15 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
16 99 (9th Cir. 1999).

17 The Commissioner has established a five step sequential evaluation process for  
18 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
19 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
20 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
21 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
22 one asks whether the claimant is presently engaged in "substantial gainful activity." 20 C.F.R.

1 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
2 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
3 or more medically severe impairments, or combination of impairments, that limit her physical  
4 or mental ability to do basic work activities. If the claimant does not have such impairments,  
5 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
6 impairment, the Commissioner moves to step three to determine whether the impairment meets  
7 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
8 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
9 twelve-month duration requirement is disabled. *Id.*

10 When the claimant's impairment neither meets nor equals one of the impairments listed  
11 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
12 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
13 Commissioner evaluates the physical and mental demands of the claimant's past relevant work  
14 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
15 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is  
16 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
17 perform other work that exists in significant numbers in the national economy, taking into  
18 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
19 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
20 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
21 be awarded.

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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

V. DECISION BELOW

On December 11, 2013, the ALJ found:

1. The claimant has not engaged in substantial gainful activity since March 21, 2012, the application date.
2. The claimant's status post myocardial infarction, with residual angina compensated with medication management; headaches; dysthymic disorder; panic disorder with agoraphobia; and generalized anxiety disorder are severe.
3. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
4. The claimant has the RFC to perform a range of sedentary work, as that term is defined in 20 C.F.R. § 416.967(a). Specifically, the claimant can lift and carry ten pounds occasionally and five pounds frequently, stand and/or walk for four hours total, and sit for eight hours total in an eight-hour work day. The claimant is precluded from working in environments involving concentrated exposure to respiratory irritants, such as odors, dust, fumes, gases and poor ventilation, and to working in environments involving concentrated exposure to extremes of temperature (less than 35 degrees Fahrenheit and/or more than 85 degrees Fahrenheit). The claimant retains the capacity for "low stress" work that does not involve goal-based production; does not involve more than occasional changes in the work setting; does not involve more than occasional interaction with supervisors, workers, and the public; and that allows for up to five percent of the workday to be spent off task.
5. The claimant is unable to perform any past relevant work.
6. Considering the claimant's age, education, work experience, and RFC, there are jobs that exist in significant numbers in the national economy that she can perform.
7. The claimant has not been under a disability, as defined in the Act, since March 21, 2012, the date the application was filed.

AR at 12-25.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Whether the ALJ erred in assessing medical opinion evidence; and

2. Whether the ALJ erred in discounting Plaintiff's credibility.  
Dkt. 11 at 1-2.

## VII. DISCUSSION

### A. The ALJ Erred in Assessing Some Medical Opinion Evidence.

Plaintiff argues that the ALJ erred in discounting opinions provided by treating physician Jennifer Dickerson, M.D.; and treating psychiatrist Walter Stearns, M.D. Plaintiff also argues that the ALJ erred in failing to address the opinion of examining psychologist Marc Miller, Ph.D., and in failing to account for all of the limitations identified by State agency reviewing psychologist Mary Hill, Ph.D., even though the ALJ purported to credit Dr. Hill's opinion. The Court will address each disputed opinion in turn.

#### 1. *Legal Standards*

As a matter of law, more weight is given to a treating physician's opinion than to that of a non-treating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751; *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his/her conclusions. "He must set forth his own interpretations and explain why they, rather than the

1 doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

2 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at  
3 725.

4 The opinions of examining physicians are to be given more weight than non-examining  
5 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the  
6 uncontradicted opinions of examining physicians may not be rejected without clear and  
7 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
8 physician only by providing specific and legitimate reasons that are supported by the record.  
9 *Bayliss*, 427 F.3d at 1216.

10 Opinions from non-examining medical sources are to be given less weight than treating  
11 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
12 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
13 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
14 Security Ruling 96-6p, 1996 WL 374180, at \*2 (Jul. 2, 1996). Although an ALJ generally  
15 gives more weight to an examining doctor's opinion than to a non-examining doctor's opinion,  
16 a non-examining doctor's opinion may nonetheless constitute substantial evidence if it is  
17 consistent with other independent evidence in the record. *Thomas*, 278 F.3d at 957; *Orn*, 495  
18 F.3d at 632-33.

19 2. *Dr. Dickerson*

20 Dr. Dickerson wrote a narrative letter describing Plaintiff's treatment history and also  
21 completed a physical capacity evaluation form opinion in June 2013. AR at 609-11. The ALJ  
22 gave Dr. Dickerson's opinions partial weight, rejecting her opinion that Plaintiff was limited to  
23 four hours of sitting per workday and that Plaintiff is likely to be absent from work at least five  
24 days per month, finding those restrictions to be unsupported by objective evidence. AR at 22.

1 The ALJ also indicated that Dr. Dickerson “relied quite heavily on the subjective reports of  
2 symptoms and limitations provided by the claimant, and that she uncritically accepted as true  
3 most, if not all, of what the claimant reported.” AR at 22. The ALJ stated that because  
4 Plaintiff’s subjective reports were not entirely reliable (for reasons explained elsewhere in the  
5 decision), Dr. Dickerson’s reliance on those statements undermined the reliability of her  
6 opinions. *Id.*

7 Plaintiff argues that the ALJ erred in rejecting Dr. Dickerson’s opinion about Plaintiff’s  
8 absenteeism, because the ALJ’s reasons for doing so are not legitimate. Dkt. 11 at 5.  
9 Specifically, Plaintiff argues that the record shows that Dr. Dickerson performed many clinical  
10 tests and was very familiar with Plaintiff’s conditions due to frequent visits. Dkt. 11 at 5-7.  
11 That may be correct, but neither Dr. Dickerson nor Plaintiff cites any clinical evidence  
12 specifically related to absenteeism. Dr. Dickerson does not explain the basis for this opinion in  
13 her narrative report, either. AR at 609. As noted by the Commissioner, Plaintiff’s medical  
14 records show that her cardiac condition was improving with treatment and medication (Dkt. 14  
15 at 6-7), and Dr. Dickerson even recommended an increase in aerobic activity prior to writing  
16 her opinion. *See* AR at 566, 572. Thus, the ALJ did not err when finding that Dr. Dickerson’s  
17 opinion as to Plaintiff’s absenteeism was unsupported by the record.

18 This is a specific, legitimate reason to reject this portion of Dr. Dickerson’s opinion.  
19 *Thomas*, 278 F.3d at 957 (“The ALJ need not accept the opinion of any physician, including a  
20 treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical  
21 findings.”). Accordingly, the ALJ did not err in discounting Dr. Dickerson’s opinion in this  
22 regard.

23 3. *Dr. Stearns*

24 Dr. Stearns completed a form opinion describing Plaintiff’s mental RFC, after a few



1 months of psychiatric treatment with Dr. Stearns. AR at 612-14. Dr. Stearns described  
2 marked and extreme limitations in Plaintiff's social functioning, and moderate limitations in  
3 Plaintiff's concentration and persistence. *Id.* Dr. Stearns indicated that Plaintiff would not be  
4 expected to be absent from work five or more days per month, but that her condition would  
5 deteriorate if placed under stress. AR at 614.

6 The ALJ found Dr. Stearns' opinion to be out of proportion to the remaining objective  
7 evidence of record[,] with "nothing in Dr. Stearns['] own reports relating to the claimant that  
8 would support such limitations." AR at 22-23. The ALJ speculated that Dr. Stearns may have  
9 felt pressured to provide an opinion to satisfy Plaintiff's requests. *Id.* The Court agrees with  
10 Plaintiff that the ALJ's speculation as to the reasons why Dr. Stearns opined as he did is not a  
11 legitimate reason to discount the opinion, but nonetheless finds support in the record for the  
12 ALJ's finding that Dr. Stearns' opinion is inconsistent with his own treatment notes. *See* AR at  
13 616-21.

14 Plaintiff focuses her challenge to the ALJ's assessment of Dr. Stearns' opinion on the  
15 speculative portion of the ALJ's reasoning, but does not establish that the ALJ's other line of  
16 reasoning (as to Dr. Stearns' opinion being unsupported and inconsistent with the many less  
17 severe findings in the treatment record) is erroneous, thereby failing to show harmful error in  
18 the ALJ's reasoning. Dkt. 15 at 4-5. Plaintiff also mischaracterizes the Commissioner's  
19 argument: the Commissioner does not contend that the ALJ's RFC assessment is consistent  
20 with Dr. Stearns' opinion. Dkt. 15 at 5. Instead, the Commissioner argues that the ALJ  
21 reasonably found Dr. Stearns' opinion to be unsupported. Dkt. 14 at 8. The Court agrees with  
22 that argument, and accordingly finds no harmful error in the ALJ's assessment of Dr. Stearns'  
23 opinion.

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1           4.       *Dr. Miller*

2           Dr. Miller performed a consultative examination of Plaintiff in June 2012 and wrote a  
3 narrative report describing her symptoms and limitations. AR at 527-32. In her opening brief,  
4 Plaintiff argues that the ALJ ignored Dr. Miller's opinion and "simply failed to address it."  
5 Dkt. 11 at 10. Plaintiff is incorrect. The ALJ discussed Dr. Miller's opinion in detail, and  
6 indicated that his RFC assessment was consistent with Dr. Miller's opinion. AR at 14, 16-17,  
7 18. The Commissioner argues that the ALJ's discussion of Dr. Miller's opinion, as well as his  
8 assertion that the RFC assessment is consistent with Dr. Miller's opinion, is sufficient  
9 consideration of the opinion, even in the absence of a specific weight assigned to the opinion.  
10 Dkt. 14 at 9.

11           Plaintiff argues in her reply brief that the ALJ did not adequately consider Dr. Miller's  
12 opinion because the ALJ did not address the opinion that Plaintiff would have difficulty  
13 dealing with the stress and pressure of work. Dkt. 15 at 6 (citing AR at 531). But the ALJ's  
14 RFC assessment specifically limits Plaintiff to "low stress work," defined to mean work that  
15 does not involve "goal-based production;" does not involve more than occasional changes in  
16 the work setting, or more than occasional interaction with supervisors, co-workers, and the  
17 public; and that permits up to 5% of the workday to be spent off-task. AR at 18. Dr. Miller  
18 did not indicate what type of "difficulty" Plaintiff would have with stress and work pressure, or  
19 indicate any particular functional limitations that would result. AR at 531. Plaintiff cannot  
20 show that the ALJ's RFC assessment is inconsistent with Dr. Miller's opinion, and thus has not  
21 shown error. *See Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir.  
22 2010).

23           5.       *Dr. Hill*

24           Upon reconsideration by the State agency, Dr. Hill opined that Plaintiff's "psych

1 [symptoms] will limit [concentration, persistence, and pace] and her ability to tolerate normal  
2 work pressures. [Plaintiff] able to perform 1-4 step tasks w/no multi-tasking and no strict time  
3 limitations.” AR at 99. Plaintiff argues that the ALJ did not adequately account for this  
4 opinion in the RFC assessment, because the ALJ did not include all of the limitations opined  
5 by Dr. Hill in the RFC assessment.

6 The Commissioner argues that the RFC assessment is not inconsistent with Dr. Hill’s  
7 opinion, and therefore adequately accounts for Dr. Hill’s opinion. Dkt. 14 at 10. While the  
8 Court found such an argument persuasive as to Dr. Miller’s opinion, because Dr. Miller’s  
9 opinion was stated in more general terms and did not present a specific inconsistency with the  
10 ALJ’s RFC assessment, Dr. Hill’s opinion is more detailed. Dr. Hill specifically identified  
11 functional limitations that would result from Plaintiff’s psychiatric symptoms, and the ALJ did  
12 not include those functional limitations in the RFC assessment or explain why those limitations  
13 were not credited. The ALJ’s restriction on goal-based production quotas is arguably  
14 consistent with Dr. Hill’s opinion regarding “strict time limitations[,]” but the restrictions as to  
15 1-4-step tasks and multi-tasking are not addressed in the ALJ’s RFC assessment. Some of the  
16 jobs identified by the vocational expert (AR at 24) could be, however, consistent with a  
17 restriction to 1-4-step tasks. *See* DOT 713.687-018, 1991 WL 679271 (identifying the job as  
18 requiring reasoning level 1 (involving one- or two-step tasks)); DOT 729.684-018, 1991 WL  
19 679720 (identifying the job as requiring reasoning level 2 (involving “uninvolved written or  
20 oral instructions). The impact of a restriction on multi-tasking is not clear.

21 Accordingly, on remand, the ALJ shall reconsider Dr. Hill’s opinion and either account  
22 for all portions of the opinion, or provide reasons to discount it.

23 B. The ALJ Did Not Err in Assessing Plaintiff’s Credibility.  
24

1 The ALJ provided a number of reasons to discount the credibility of Plaintiff's  
2 subjective complaints. First, the ALJ found Plaintiff's allegations of an inability to work due  
3 to chest pain and shortness of breath to lack credibility in light of the medical evidence  
4 showing the stability of Plaintiff's symptoms and the evidence related to her activities,  
5 including traveling, volunteering, and household activities. AR at 19-20. Second, the ALJ  
6 found that Plaintiff's allegation of work limitations due to headaches lacked credibility because  
7 her minimal treatment was conservative in nature and no treating or examining physician ever  
8 opined that Plaintiff's headaches caused functional limitations. AR at 20. Lastly, as to  
9 Plaintiff's allegations of mental limitations, the ALJ found that Plaintiff's minimal,  
10 conservative treatment for psychiatric conditions, as well as Dr. Miller's opinion, indicates that  
11 her conditions are not as severe as alleged. AR at 20-21. The ALJ also referenced his  
12 findings at step two regarding the "paragraph B" criteria, as support for his finding that  
13 Plaintiff's mental functional limitations did not preclude work. AR at 21. The Court will  
14 consider each of Plaintiff's challenges to the ALJ's credibility rationale in turn.

15 1. *Legal Standards*

16 As noted above, credibility determinations are within the province of the ALJ's  
17 responsibilities, and will not be disturbed, unless they are not supported by substantial  
18 evidence. A determination of whether to accept a claimant's subjective symptom testimony  
19 requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR  
20 96-7p. First, the ALJ must determine whether there is a medically determinable impairment  
21 that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.  
22 §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant  
23 produces medical evidence of an underlying impairment, the ALJ may not discredit the  
24 claimant's testimony as to the severity of symptoms solely because they are unsupported by

1 objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc);  
2 *Reddick*, 157 F.3d at 722. Absent affirmative evidence showing that the claimant is  
3 malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant’s  
4 testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

5 When evaluating a claimant’s credibility, the ALJ must specifically identify what  
6 testimony is not credible and what evidence undermines the claimant’s complaints; general  
7 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may  
8 consider “ordinary techniques of credibility evaluation” including a reputation for truthfulness,  
9 inconsistencies in testimony or between testimony and conduct, daily activities, work record,  
10 and testimony from physicians and third parties concerning the nature, severity, and effect of  
11 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*  
12 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

## 13 2. *The ALJ’s Rationale*

14 Plaintiff argues that the ALJ erred in assessing the credibility of her cardiac symptoms  
15 (chest pain and shortness of breath) for a number of reasons. First, Plaintiff argues that the  
16 ALJ misrepresented her allegations, because she never claimed to be completely incapacitated  
17 by her cardiac symptoms. Dkt. 11 at 12. The ALJ did not state that Plaintiff claimed to be  
18 unable to work due *solely* to cardiac symptoms; Plaintiff herself identified her cardiac  
19 symptoms as a reason she could not work. *See* AR at 49-50. The Court finds that the ALJ did  
20 not misrepresent Plaintiff’s allegations.

21 Plaintiff also argues that the ALJ erred in relying on her daily activities to discredit her  
22 cardiac symptoms, because the ALJ did not explain how these activities either contradict her  
23 testimony or demonstrate transferable work skills. The Court agrees, and finds this line of  
24 reasoning to be erroneous. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities

1 may undermine credibility where they (1) contradict the claimant's testimony or (2) "meet the  
2 threshold for transferable work skills"). The ALJ also provided another reason to discredit  
3 Plaintiff's allegations related to her cardiac condition — namely her conservative treatment  
4 (AR at 19-20) — and Plaintiff does not challenge this portion of the ALJ's reasoning. This  
5 reason is clear and convincing. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40 (9th Cir.  
6 2008). Accordingly, the ALJ's reasoning as to Plaintiff's daily activities is harmless error. *See*  
7 *Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

8 Plaintiff does not challenge the ALJ's rationale with respect to her allegations of  
9 headaches, but does dispute whether her minimal treatment for mental health complaints is a  
10 convincing reason to discount her credibility. Dkt. 11 at 14. Plaintiff argues that the ALJ  
11 should have considered whether her "inability to afford health care might provide an adequate  
12 explanation as to why she had not received mental health treatment." *Id.* Plaintiff cites no  
13 portion of the record suggesting that she did not receive treatment due to an inability to pay,  
14 and speculation in a brief does not amount to substantial evidence. Accordingly, Plaintiff has  
15 not established error in this line of the ALJ's reasoning.

## 16 VIII. CONCLUSION


17 For the foregoing reasons, the Court recommends that this case be REVERSED and  
18 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's  
19 instructions. A proposed order accompanies this Report and Recommendation.

20 Objections to this Report and Recommendation, if any, should be filed with the Clerk  
21 and served upon all parties to this suit by no later than **March 22, 2016**. Failure to file  
22 objections within the specified time may affect your right to appeal. Objections should be  
23 noted for consideration on the District Judge's motion calendar for the third Friday after they  
24 are filed. Responses to objections may be filed within **fourteen (14)** days after service of

1 objections. If no timely objections are filed, the matter will be ready for consideration by the  
2 District Judge on **March 25, 2016**.

3 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
4 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
5 assigned District Judge acts on this Report and Recommendation.

6 DATED this 8th day of March, 2016.

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9 JAMES P. DONOHUE  
Chief United States Magistrate Judge